Petition

No. 81-356

Office-Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ANDERSON, ROBERT BACON, JAMES CERVONE, DOMENIC DiIULIO, WILLIAM GRUNDY, RICHARD HAACK, DONALD HALAWITH, ERNEST HUSTEDT, HARVEY JOHNSON, STEVEN KALBACH, FRANCIS H. KELLY, JAMES LARRIVEE, EDWARD MANKE, DONALD MICHALSKI, BERNARD NESSEL, NORMAN NISSEN, THOMAS O'CULL, SIGMUND TRYKOSKI, WALTER WAGEMANN, JOSEPH WILLIAMS and THOMAS LAZZARA,

Petitioners,

vs.

CITY OF NORTHLAKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Can a proprietary interest be created in overtime pay by an implied contract?

II. Can a proprietary interest in longevity pay be created by ordinance?

III. Can such proprietary interests be abrogated retroactively by subsequent ordinances eliminating such proprietary interests?

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In The

Supreme Court of the United States

October Term, 1980

WILLIAM ANDERSON, ROBERT BACON, JAMES CERVONE, DOMENIC DiIULIO, WILLIAM GRUNDY, RICHARD HAACK, DONALD HALAWITH, ERNEST HUSTEDT, HARVEY JOHNSON, STEVEN KALBACH, FRANCIS H. KELLY, JAMES LARRIVEE, EDWARD MANKE, DONALD MICHALSKI, BERNARD NESSEL, NORMAN NISSEN, THOMAS O'CULL, SIGMUND TRYKOSKI, WALTER WAGEMANN, JOSEPH WILLIAMS and THOMAS LAZZARA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

On November 30, 1980, the Honorable Nicholas J. Bua of the United States District Court for the Northern District of Illinois, Eastern Division, denied petitioners' Motion for Summary Judgment that the City of Northlake, Illinois, respondent, had created a property interest in continued overtime pay for hours worked in excess of 40 pursuant to an implied contract to that effect and that the City of Northlake, Illinois, had created a property interest via ordinance for payment of longevity pay and that the City of Northlake's attempt by subsequent ordinances eliminating such overtime pay and longevity pay was an abrogation of the petitioners' property rights in violation of the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution, the ex post facto and impairment of obligations clauses, Article I, Par. 10, Cls. 1, of the United States Constitution.

In denying the petitioners' Motion for Summary Judgment, the Honorable Nicholas J. Bua granted a summary judgment in favor of the respondent on the legal theory that the petitioners did not demonstrate a legitimate claim of entitlement to overtime and longevity pay. (Order of November 30, 1980, of the Honorable Nicholas J. Bua is reprinted herein as Appendix A).

On May 26, 1981, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, affirmed the judgment of the Honorable Nicholas J. Bua by adopting his order of November 30, 1980, as the unpublished order of the Appellate Court which ordered is reprinted herein as Appendix B.

JURISDICTION

1. The federal questions were raised by the petitioners in their Complaint for Declaratory Judgment to the effect that the City of Northlake, Illinois, Ordinance #0-01-78, passed on January 10, 1978, eliminating overtime pay and Ordinance #0-3-78, passed on February 20, 1978, eliminating longevity pay constituted a violation of Article I, Par. 10, Cls. 1 of the United States Constitution, impairment of obligation of contracts, and a violation of the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution, 28 U.S.C. 1331 and 1343, and 28 U.S.C. 2201 and 2202, 42 U.S.C. 1983.

2. The Petition for Certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on May 26, 1981.

CONSTITUTION INVOLVED

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

That prior to January 10, 1978, the petitioners had been paid overtime for working in excess of 40 hours per week.

On January 10, 1978, the City of Northlake, Illinois, passed Ordinance #0-01-78 which eliminated overtime pay for working in excess of 40 hours and substituted payment of straight time for excess hours accrued prior to January 10, 1978, and provided for compensatory time after January 10, 1978.

That prior to February 28, 1978, the petitioners were paid longevity pay pursuant to Northlake, Illinois, Ordinance #0-1-66.

That on February 28, 1978, the City of Northlake, Illinois, passed Ordinance #0-3-78 providing that longevity accruing prior to February 25, 1978, would be acknowledged, since it was considered a vested right and that, after February 28, 1978, longevity pay would no longer be paid.

That petitioners filed a complaint for declaratory judgment and other relief pursuant to 42 U.S.C. 1983, the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution, the ex post facto and impairment of obligation of contracts clause, Article I, Par. 10, Cls. 1 of the United States Constitution.

In their complaint for declaratory judgment and other relief, the petitioners alleged that the City of Northlake, Illinois, in passing Ordinance #0-01-78, on January 10, 1978, eliminating overtime pay for work in excess of 40 hours by substituting straight time for such excess hours accrued prior to January 10, 1978, and payment of compensatory time after January 10, 1978, and in passing Ordinance #0-3-78, on February 28, 1978, eliminating longevity pay after February 28, 1978, constituted a violation of Article I, Par. 10, Cls. 1 of the United States Constitution pertaining to ex post facto and impairment of obligation of contracts clause, and a violation of the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution.

In connection with the complaint for declaratory judgment and other relief, the respondent filed a motion to dismiss the complaint which motion was denied.

Subsequently, the respondent filed its answer admitting that the ordinances in question had been passed, but that they had not violated the constitutional considerations as raised by the complaint for declaratory judgment and other relief as filed by the petitioners.

ARGUMENT

The issues are whether proprietary interests were created in overtime and longevity pay which had been abrogated retroactively by subsequent City of Northlake, Illinois, ordinances eliminating such proprietary interests in violation of petitioners' United States constitutional rights relating to due process and equal protection under the Fourteenth Amendment and impairment of obligation of contracts under Article I, Par. 10, Cls. 1.

In *Bishop v. Wood*, 44 LW 4820 (1976), at Page 4821, the Court states:

> "A property interest in employment can, of course, be created by ordinance or by an implied contract."

Prior to January 10, 1978, the City of Northlake, Illinois, paid overtime to the petitioners for working in excess of 40 hours per week.

The basis for the overtime payment was the issuance of a written directive on August 19, 1974, by then and current Chief Lee R. Gehrke and the Treasurer's office that overtime worked after 40 or 48 hours would be paid at time and one-half.

Such a directive constituted an implied contract that entitled the petitioners to overtime pay pursuant to the observations as stated on page 580, *Perry v. Sinderman*, 33 L. Ed. 2d 570 (1972), wherein the Court recognizes that an employer by his words and conduct can create an implied contract which observations are quoted as follows:

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3 A. Corbin on Contracts Pars. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." Id., at Par. 562. And, "(t)he meaning of (the promisor's) words and acts is found by relating them to the usage of the past." (408 US 602)

As a consequence, when the City of Northlake, Illinois, passed an ordinance on January 10, 1978, #0-01-78, eliminating overtime pay, it, in effect, amended a contractual relationship that was based upon an implied contract in violation of the ex post facto and impairment of contracts clause of the United States Constitution and the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution.

To support the petitioners' position that the elimination of longevity pay violated their constitutional rights as described, petitioners cite *Arnett v. Kennedy*, 416 U.S. 134 and *United States v. City of Chicago*, 549 F.2d 415, which hold that ordinances or statutes that provide for due process hearings prior to discharge and promotions pursuant to state law create property or vested rights which must be observed.

Therefore, on the basis of *Bishop v. Wood*, *Perry v. Sinderman*, *Arnett v. Kennedy*, and *United States v. City of Chicago*, the petitioners had a prior implied contractual relationship for the overtime pay and an ordinance for the longevity pay that created vested rights which the City of Northlake, Illinois, could not impair retroactively without meeting certain criteria.

To impair a vested right retrospectively, the state or city must meet four criteria pursuant to *Allied Structural Steel Co. v. Warren Spannaus et al.*, 57 L.Ed. 727 (1978), which criteria are identified at page 735 as:

> First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. Id., at 444, 78 L.Ed. 413, 54 S. Ct. 231, 88 ALR 1481.
>
> Second, the state law was enacted to protect a basic societal interest, not a favored group. Id., at 445, 78 L.Ed. 413, 54 S.Ct. 231, 88 ALR 1481.
>
> Third, the relief was appropriately tailored to the emergency that it was designed to meet. Ibid.
>
> Fourth, the imposed conditions were reasonable. Id., at 445-447, 78 L.Ed. 413, 54 S. Ct. 231, 88 ALR 1481.
>
> And finally the legislation was limited to the duration of the emergency, Id., at 447, 78 L. Ed. 413, 54 S. Ct. 231, 88 ALR 1481.

Applying the criteria of the *Allied Structural Steel Co.* decision to the amending Northlake ordinances that eliminated overtime and longevity pay, those ordinances did not address themselves to any emergency for eliminating the overtime and longevity pay; they were not enacted to protect a basic societal interest, since the ordinances did not enumerate any necessity for economizing village expenditures for the benefit of the

Northlake, Illinois, citizens; the elimination of the overtime and longevity pay was not tailored to any emergency; the elimination of the overtime and longevity pay was not reasonable in that it deprived the petitioners of promised monies in conjunction with their consideration to be employed as police officers for the City of Northlake, Illinois; that the ordinances were not limited to any duration of an emergency as no emergency was described.

As a result, on the basis of the *Allied Structural Steel Co.* decision, the Northlake, Illinois, ordinances eliminating the overtime and longevity pay did impair the vested rights of the petitioners retrospectively in violation of the impairment of contracts clause and ex post facto law of the United States Constitution.

Furthermore, in conjunction with the *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court asserts that a vested right can be impaired in violation of the Fourteenth Amendment of the United States Constitution via retrospective application of newly created statutes to that effect as evidenced by the following language of that decision:

> "(1) Retrospective civil laws, if sufficiently harsh and oppressive, may violate the due process clause, even when no vested right of any kind has been impaired, 45 LW at 4422, n.13. See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976).
>
> (2) Although there is no vested right to the continued existence of a particular law, a particular law may create or result in a vested right where the "language and circumstances" so indicate, and the right cannot be impaired by repeal of the statute or ordinance, see 45 LW at 4422, n.14. See also

Indiana, ex rel. Anderson v. Brank, 303 U.S. 95, 104-105 (1938).

(3) Although the state may not "contract away" its right to exercise the police power, such a power may not be used to impair a contract or vested right created by the state unless "reasonable and necessary" to accomplish a compelling state purpose that could not have been foreseen at the time the right was created, 45 LW 4425 at n.28.

(4) Where a contract or vested right is completely extinguished by an exercise of the police power, the holders of such a right are entitled to "just compensation" from the state, see 45 LW at 4422, n.16. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)."

In considering the *United States Trust Co.'s* four criteria, the *Allied Structural Steel Co.* court held on page 438:

". . . Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem." . . . .

Therefore, analyzing the Northlake, Illinois amending ordinances, there is no showing by the City of Northlake, Illinois that those ordinances were necessary and reasonable for the purpose of severely disrupting the contractual expectations of the petitioners in their vested rights to overtime and longevity pay in order to meet a general important social problem.

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

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August 21, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM ANDERSON, ROBERT BACON, JAMES CERVONE, DOMENIC DIIULIO et al.,

Plaintiffs,

No. 78 C 1755 *v.*

CITY OF NORTHLAKE,

Defendant.

Before the Honorable Nicholas J. Bua,
Judge, United States District Court

ORDER

The matter at bar is an action brought pursuant to 42 U.S.C. § 1983 by certain police officers of the City of Northlake, wherein they seek declaratory and injunctive relief for alleged violations of their constitutional rights. Subject matter jurisdiction with respect to the cause properly lies under 28 U.S.C. § 1343(3). The sole defendant herein is the City of Northlake. The controversy in this matter arose when the Northlake City Council passed an ordinance which eliminated longevity increases from police officers' pay and changed their rate of overtime compensation. The plaintiffs contend that said ordinance is unconstitutional.

Presently before the court is the plaintiffs' motion for summary judgment. Rule 56(a), Fed. R. Civ. P. This motion of the plaintiffs will, for the reasons stated below, be denied. Also, although the defendant has not formally

cross-moved for such, summary judgment will be entered in favor of the City of Northlake.[1] *See Watkins Motor Lines, Inc. v. Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill. 1974), *aff'd*, 525 F.2d 538 (7th Cir. 1975).

In the matter at bar those facts material to the plaintiffs' cause do not appear to be in dispute. As was noted above, the controversy herein revolves around an ordinance passed by the City Council of the City of Northlake, to become effective on January 9, 1978, which eliminated longevity increases and changed the rate of overtime pay for the Northlake police force. Longevity pay had originally been established in a 1966 ordinance which provided that all City of Northlake employees were to be given a two percent longevity raise during their fifth, sixth and seventh years of employment. Prior to the January, 1978 ordinance, overtime pay had apparently been based upon custom and practice, as supplemented by periodic memoranda issued by the Chief of Police. One such memorandum, dated August 19, 1974, directed that the City Treasurer compensate all members of the Northlake Police Department at the rate of time and one-half for overtime work.

The plaintiffs claim that the ordinance in question is unconstitutional for three reasons: (a) because it purportedly deprives them of a protected property interest, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments; (b) because it impermissibly impairs a contractual obligation owed by the City to the police officers, in violation of the Contract Clause; and (c) because the ordinance constitutes an *ex post facto*

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[1] A court, when ruling upon a motion for summary judgment, may if the situation at bar reasonably allows for such to be done properly render summary judgment in favor of a non-moving party, even when no formal cross-motion has been made by such party under Rule 56. 10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2720; *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill. 1974), *aff'd*, 525 F.2d 538 (7th Cir. 1975).

law. Of most significance with respect to these contentions is the question of whether the plaintiffs had any protected property interest in the continued receipt of longevity pay increases and time and one-half overtime compensation. In this regard, the issue presented is whether, under Illinois law, the above-noted 1966 ordinance and/or 1974 memorandum created in the plaintiffs a protected property interest which was violated by passage of the 1978 ordinance.

For due process purposes, to have a cognizable property interest in governmental benefits it is not enough that the claimant has a demonstrated need for such benefits; rather he must have a legitimate claim of entitlement to them. *Confederation of Police v. City of Chicago*, 481 F. Supp. 566, 569 (N.D. Ill. 1980). Such an entitlement may stem from a state law conferring the benefit in issue, or from rules or mutually explicit understandings which would support the claim presented. *Id.* at 569. Regarding this question, the plaintiffs claim that the 1966 ordinance and 1974 memorandum both are sufficient support for a claim of entitlement. The sufficiency of this contention, however, must be decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976).

Under Illinois law, it is well settled that public employees do not have a property interest in the continued application of any specific rate or method of compensation. *Chicago Patrolmen's Ass'n v. City of Chicago*, 56 Ill. 2d 503, 508 (1974). Unless it can be shown that the legislative act in issue will operate to deny to the plaintiff compensation for services rendered prior to the enactment's effective date, there can be no basis for finding that the enactment violates due process. *Jordan v. Metropolitan Sanitary District*, 15 Ill. 2d 369 (1958). In the present case, under the terms of the 1978 ordinance passed by the Northlake City Council, all of the longevity increases that had accrued during the 1966 ordinance was in effect were to be prorated as of the date of repeal and added to the employee's base pay. Similarly, payment of overtime at the rate of time and one-half was to be continued until the effective date of the 1978 or-

dinance. That being so, under Illinois law the 1978 statute did not deprive the plaintiffs of any property rights arising from the 1966 ordinance or 1974 memorandum.

The 1966 ordinance and the 1974 memorandum, standing alone, thus did not create in the plaintiff police officers any property interests cognizable under the due process clause. The plaintiffs, though, also argue that, through those acts, a contractual relationship was established between the parties which created in the officers a protected property interest in the continued receipt of all of the contractually provided for benefits. If such a contractual relationship could in fact be demonstrated, the plaintiffs' argument in this respect would have merit. For the reasons stated below, however, the court finds that no valid contract existed between the parties.

To determine whether a contract existed between the parties, the 1966 ordinance and the 1974 memorandum both must be examined. As to whether the 1966 ordinance gave rise to such a contractual relationship, the rules of statutory construction must be applied. *See City of East St. Louis v. Union Electric Co.*, 37 Ill. 2d 537 (1967). Whether a statute creates contractual rights is to a great extent dependent upon the language used. *In re Application of Skidmore*, 75 Ill. 2d 33 (1979). When the legislative act in question is one fixing salaries for public employees, however, there is a presumption that the statute was not meant or intended to create private contractual rights, but rather was intended merely to declare a policy to be pursued until the legislature declared otherwise. *Dodge v. Board of Education of Chicago*, 302 U.S. 74 (1937). *See also Crumpler v. County of Logan*, 38 Ill. 2d 146 (1967). In the case at bar, this presumption is supported by two factors. The first is an affidavit of the Northlake City Attorney, submitted by him in his capacity as author of the 1966 ordinance, wherein he states that, in passing said ordinance, the City of Northlake never intended to confer to its employees any private contractual rights. The accuracy

of this statement, it should be noted, has not in any way been challenged or refuted by the plaintiffs.

Also supportive of the aforementioned presumption is the language of the statute itself. The 1966 ordinance was entitled "An Ordinance Establishing the Personnel Policy for the City of Northlake, Illinois." Its stated purpose was to set forth a uniform policy concerning Northlake personnel to better permit sound administration of the government. This language, rather than evidencing an intent by the City to enter into a binding contract, appears much more to conform to the *Dodge* Court's presumption that legislation of this type is in most instances only a policy statement.

From the above, it thus must be concluded that, because the requisite intent was lacking, no contract between the parties was created by the 1966 ordinance. Regarding the 1974 memorandum, although it was not a legislative act, the determination of whether that document created legally enforceable contractual rights in the plaintiffs requires resolution of the same issue; i.e. whether the parties, by this action, intended that a contract be created. *United States v. O. Frank Heinz Construction Co.*, 300 F. Supp. 396, 399 (S.D. Ill. 1969).

When the essential facts are not in dispute, the question of the existence of a contract is solely one of law. 300 F. Supp. at 399. From the facts in this matter, it does not appear reasonable to conclude that the City of Northlake intended for the 1974 memorandum to constitute a binding agreement. That document, for example, was only one of several such memoranda that had been issued from time to time, all apparently for budgetary considerations. Because the rate of overtime compensation had been altered on several occasions in the past, the fact that the memorandum in question did not set forth any period of duration also is noteworthy. The plaintiffs, in addition, have not presented any viable reasons for concluding that this particular memorandum was intended to be contractually binding, when other such memoranda clearly had not been so intended.

If the City lacked the intent to create a contract through the use of the formal ordinance procedure, it is difficult to imagine that this intent was present in the issuing of an informal periodic memorandum. That such a conclusion is proper is supported by the aforementioned affidavit of the Northlake City Attorney—an affidavit which has gone unanswered by plaintiffs—where he again states that the City had no contractual intent. From the facts before the court, it thus must be concluded both that the City of Northlake, in issuing the 1974 memorandum, never intended to enter into a contract with plaintiffs, and that no valid or enforceable contract ever existed.

Since no contract existed between the parties, the plaintiffs' alternative contention that the defendant, through the actions complained of, impaired its obligations under the police officers' contract (thus violating the Contract Clause), also cannot stand. Finally, as the 1978 ordinance did not make criminal that which was an innocent act before its passage, it does not constitute *ex post facto* law. *See United States v. Sutton*, 521 F.2d 1385 (7th Cir. 1975).

CONCLUSION

Under the undisputed facts of the case, the plaintiffs' theories for recovery are contrary to the law. That being so, their motion for summary judgment is denied. Also, as the defendant is, from the facts presented, clearly entitled to judgment as a matter of law, summary judgment will be entered for the City of Northlake.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
United States District Judge

DATED: November 13, 1980

APPENDIX B

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued May 13, 1981
May 26, 1981.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. EARL R. LARSON, *Senior District Judge**

WILLIAM ANDERSON, et al.,

Plaintiffs-Appellants,

No. 80-2758 *v.*

CITY OF NORTHLAKE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-1755—**Nicholas J. Bua**, *Judge.*

ORDER

Plaintiffs, certain police officers employed by defendant, the City of Northlake, appeal from a district court order granting summary judgment against them and in favor of defendant. Having read the briefs and heard oral argument, we are persuaded that the district

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* The Honorable Earl R. Larson, Senior District Judge of the District of Minnesota, is sitting by designation.

court's judgment is correct for the reasons stated by Judge Bua in his attached decision and order of November 13, 1980. We adopt that decision and order and affirm the district court's order and entry of judgment.

Affirmed.

Opposition

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Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the 1966 Northlake Ordinances and 1974 Memorandum created any property or contractual rights in Plaintiffs-Petitioners which were unconstitutionally abrogated or impaired by the 1978 amending Ordinances.

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NATURE OF THE CASE

The Petitioners have adequately stated the nature of the case and repetition thereof would serve no useful purpose.

STATEMENT OF FACTS

The facts material to this cause are not in dispute. The controversy revolves around an Ordinance passed by the City of Northlake, to become effective January 9, 1978, which eliminated longevity increases and changed the rate of overtime pay for the Northlake police force. Longevity pay had originally been established in a 1966 Ordinance which provided that all City employees were to be given a two percent (2%) longevity raise during their fifth (5th), sixth (6th) and seventh (7th) years of employment. Prior to the January 1978 Ordinance in question, overtime pay had been based upon custom and practice as supplemented by periodic memoranda issued by the Chief of Police. One such Memorandum dated August 19, 1974, which is in issue in the case at bar, being the last one issued prior to the 1978 Ordinance, directed overtime be paid at a rate of time and one-half.

ARGUMENT

THE NORTHLAKE ORDINANCES IN QUESTION CHANGING THE MANNER OF COMPENSATION FOR OVERTIME PAY AND ELIMINATING LONGEVITY PAY DO NOT VIOLATE ANY CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS OF THE PLAINTIFFS.

This case involves a controversy arising when the Northlake City Council passed an ordinance which eliminated longevity increases for police officer's pay and changed their rate of overtime compensation. The Petitioners contend this ordinance is unconstitutional in that it constitutes an impairment of contracts and a denial of a property right without due process of law. Petitioners are in error in both respects since no contractual rights are involved and Plaintiffs possess no property rights in the matters at issue herein.

It is conceded by the parties that there are no written or acknowledged express employment contracts between the parties conveying any salary rights or governing pay provisions and the sole basis of relief is Petitioner's contention of the existence of a constitutionally protected property right and/or an implied contract. None of the cases cited by Petitioners in their Petition are on point in establishing such a right as a matter of law. The citations are taken out of context and none of the cases cited create, establish or stand for the propositions Petitioners seek to establish, namely a constitutionally protected property right to continued pay, free from alteration, decrease, amendment or any impairment during the course of continued employment. The Petitioners' cases singularly involve property rights in governmental employment itself and obtaining such

employment; not the conditions or terms of such employment.

It must be pointed out here that no issue of selective enforcement or equal protection is raised by Petitioners and it is conceded that the ordinances in question treat all policemen as a class uniformly. Likewise, there is no claim that the ordinances will operate to deny Petitioners compensation for services already rendered prior to the enactment's effective date. All longevity increases that had accrued while the 1966 Ordinance was in effect were prorated as of the date of repeal and added to the employee's base pay. Similarly, payment for overtime was continued at the prior rate until the effective date of the 1978 amending ordinance. This clearly complied with Illinois law concerning such pay changes, (*Jordan v. Metropolitan Sanitary District*, 15 Ill. 2d 369 (1958) as the lower court herein correctly held.

Respondent believes and the lower court agreed that *Bishop v. Woods*, 426 U.S. 348, 96 Sup. Ct. Rptr. 2074, 48 L.Ed.2d 684 (1976) as extended by the Seventh Circuit Court of Appeals holding upon remand in *Confederation of Police v. City of Chicago*, 547 F.2d 375 (7th Cir. 1977) contains the governing law of this case. In *Confederation*, policemen contended that they were subjected to changes in geographic assignments, work schedules, vacation schedules, leaves of absence, demotion in rank, and other conditions of employment, many of which result in imposing greater job obligations and burdens or having the effect of reducing or altering pay and remuneration. The plaintiffs contended therein that the existence of the recognized property right to public employment cognizable under the due process clause extended over and applied equally with full force to the conditions of such employment. Initially, the Seventh

Circuit agreed with this premise and held for the plaintiffs, (See 529 F.2d 89), but this court vacated and remanded (427 U.S. 902, S. Ct., 3186, 49 L.Ed.2d 1196) in light of its holdings in *Bishop v. Woods*, supra, *Montayne v. Haynes*, 427 U.S. 236, 96 Sup. Ct., 2543, 49 L.Ed.2d 466 (1976) and *Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L.Ed.2d 451 (1976). On remand, the Seventh Circuit reversed itself.

Thus, the present status of the law is that there is no federally protected property interest in the conditions of public employment, and inclusive therein are questions of remuneration and pay. However, this court did recognize that certain exceptions could occur, particularly existence of some local law or statute or ordinance creating an expectation that a particular employment relationship or condition thereof will continue unless certain defined events occur. *Bishop v. Woods*, supra. *Confederation of Police v. City of Chicago*, supra.

For due process purposes, however, to have a cognizable property right in governmental benefits it is not enough that the claimant have demonstrated a need for such benefits; rather he must have a legitimate claim of entitlement to them. *Confederation of Police v. City of Chicago*, 481 F. Supp. 566 at 569 (N.D. Ill. 1980). Such a right may stem from a State law conferring the benefit, or from rules or mutually explicit understandings between the parties which would contractually suggest the claim. The sufficiency of this contention must be decided by reference to State law. *Bishop v. Woods*, supra.

With regard to Illinois law, the Illinois Supreme Court, the Seventh Circuit Court of Appeals and this court have already specifically held that no State statutory, regulatory or judicial sources exist conveying

such an expectancy, concerning conditions of employment of police officers involving municipal employment and methods and levels of pay. *Confederation of Police v. City of Chicago*, supra. *Chicago Patrolman's Association v. City of Chicago*, 56 Ill. 2d 503 (1974). The 1966 Ordinances and the 1974 Memorandum relied upon by Petitioners thus, standing alone, did not create in the Petitioners any property interests cognizable under the due process clause.

Remaining for consideration then, is the issue raised by Petitioners concerning the existence of a contractual relationship concerning pay provisions between the parties. Again this is a question which must be determined under State Law. *Bishop v. Woods*, supra. A review of the facts and circumstances in the case at bar amply demonstrates that no contract can be implied herein. Petitioners have already conceded the absence of an express (written or oral) contract.

Under Illinois Law, to determine whether the 1966 Ordinance and/or 1974 Memorandum gave rise to an implied contractual relationship, the rules of statutory construction must be applied. *City of East St. Louis v. Union Electric Company*, 37 Ill. 2d 537, (1967). Whether a statute creates contractual rights is to a great extent dependent upon the language used. *In Re: Application of Skidmore*, 75 Ill. 2d 33 (1979). However, when the legislative enactment in question is one of fixing salaries for public employees, there is a presumption that the statute was not meant nor intended to create private contractual rights, but rather was merely intended to declare a policy to be pursued until the legislative body in question declared otherwise. *Dodge v. Board of Education of Chicago*, 302 U.S. 74 (1937), *Crumpler v. County of Logan*, 38 Ill. 2d 146 (1967).

In the case at bar, Petitioners have not demonstrated nor attempted to put forth or argue any factors rebutting or refuting this presumption. On the other hand, two important factors exist, as the court below pointed out, clearly supporting this presumption that the 1966 Ordinance or 1974 Memorandum were merely policy declarations concerning pay. First the Affidavit of the City Attorney clearly established the intent of the Respondent City. It should be further noted that this Affidavit has gone unchallenged and unrebutted in this record. Secondly, the title of the Ordinance itself clearly recites the Respondent's intent at the time of drafting. The Ordinance was entitled, "An Ordinance Establishing The Personnel Policy for the City of Northlake, Illinois". Its stated purpose was to merely set forth a uniform policy to better permit sound administration of the government. From the above, it must be concluded that because the requisite intent was lacking, no contract, implied or otherwise, was created between the parties.

With regard to the 1974 Memorandum, the Court below found an additional factor indicative of an absence of intent on the part of Respondent in creating any contractual rights. These factors are worthy of reiteration herein and consideration. The Memorandum in question was only one of several such Memoranda that had been issued from time to time, all for budgetary considerations. These Memoranda have in the past on several occasions, altered the rate of overtime compensation. None of these Memoranda set forth any period of duration. Finally, if the Respondent lacked intent to create a contract through use of a formal Ordinance procedure, it is inconceivable to imply such an intent as being present in the issuing of the informal Memorandum.

Thus, since no contract existed between the parties, Petitioners' alternative theory must likewise fail. No im-

pairment of obligations violative of the contract clause can result in the absence of any contractual or proprietary interest. Finally, since no ex post facto violation occurred herein rendering criminal that which was an innocent act prior to passage, (*United States v. Sutton*, 521 F. 2d 1385 (7th Cir. 1975), the Court below was totally correct in granting summary judgment to Respondents. When the essential facts are not in dispute, the question of the existence of a contract is solely a question of law. *United States v. O. Frank Heinz Construction Company*, 300 F. Supp. 396, 399 (N.D. Ill. 1969).

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ANDERSON, ROBERT BACON, JAMES CERVONE, DOMENIC DiIULIO, WILLIAM GRUNDY, RICHARD HAACK, DONALD HALAWITH, ERNEST HUSTEDT, HARVEY JOHNSON, STEVEN KALBACH, FRANCIS H. KELLY, JAMES LARRIVEE, EDWARD MANKE, DONALD MICHALSKI, BERNARD NESSEL, NORMAN NISSEN, THOMAS O'CULL, SIGMUND TRYKOSKI, WALTER WAGEMANN, JOSEPH WILLIAMS and THOMAS LAZZARA,

Petitioners,

vs.

CITY OF NORTHLAKE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1980

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its brief in opposition to the Petition for Writ of Certiorari, on page 6, the respondent states as follows:

> "However, when the legislative enactment in question is one of fixing salaries for public employees, there is a presumption that the statute was not meant or intended to create private contractual rights, but rather was merely intended to declare a policy to be pursued until the legislative

> body in question declared otherwise. *Dodge v. Board of Education of Chicago*, 302 U.S. 74 (1937), *Crumpler v. County of Logan*, 38 Ill.2d 146 (1967)."

In addition to the cited cases of *Dodge* and *Crumpler*, the Respondent relies upon the alleged unrebutted affidavit of the city attorney, that the 1966 ordinance and 1974 memorandum were not intended to create an implied contract, to support the legal position that, in fact, no implied contracts were effectuated.

However, the *Dodge* decision is inappropriate, since it concerned itself with teachers who had not contributed to annuity or pension funds thereby not attaining vested rights which would enable them to prevent the modification or abolishment of such funds.

In this instance, longevity pay is included in the salaries of the Petitioners from which salaries 8½% is deducted and deposited in the pension fund as verified by their unrebutted and unchallenged affidavits as set forth in the Motion for Summary Judgment.

Likewise, the *Crumpler* decision is not apropos, because it dealt with the abolishment of a certain public office (elimination of the Justice of the Peace) thereby resulting in a justification for not reimbursing the Justices of the Peace for their expenses after the abolishment of that public office.

In this matter, there is no abolishment of the office of police officer which would justify the elimination of longevity pay.

As for the affidavit of the city attorney that the intent of the City of Northlake was not to create an implied contract for longevity pay, that intent was certainly conveyed to the Petitioners as is reflected in their affidavits and which affidavits certainly challenge the affidavit of the city attorney in that respect as is substantiated by

attaching one of such affidavits, which truly and correctly states the content of all of the other affidavits of the Petitioners as had been attached to their Motion for Summary Judgment, and is reprinted herein as Appendix A.

Furthermore the 1966 ordinance entitled "Ordinance Establishing Personnel Policy for the City of Northlake" does not negate the existence of the implied contract, since the Respondent correlates that policy as conforming with the *Dodge* decision which decision had been distinguished from the standpoint that the *Dodge* plaintiffs did not contribute to annuity or pension funds while the Petitioners, herein, do contribute payments to their pension fund for longevity pay received.

As for the 1974 Memorandum, the affidavit of the city attorney was certainly challenged and refuted by the affidavits of the Petitioners (the content of affidavits reprinted in Appendix A), when, in those affidavits, the Petitioners state that they had been paid overtime pay pursuant to the 1974 Memorandum and that they had considered the overtime pay as consideration for their employment as City of Northlake police officers, thereby establishing an implied contractual relationship.

Likewise, the affidavit of the city attorney relating to the issue of whether the 1974 Memorandum created an implied contract in overtime pay was challenged by the Reply Brief of the Petitioners' Motion for Summary Judgment, when the Petitioners rebutted and refuted that affidavit in the following manner:

> "At the same time, in his affidavit Attorney John E. Dvorak, does not cite any specific dates, specific changes in manner of operation, nor specific changes in amount to be paid pertaining to general allegation that, on numerous occasions, the City of Northlake had changed the custom and practice of paying overtime pay."

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM ANDERSON, ROBERT BACON, JAMES CERVONE, DOMENIC DiIULIO, WILLIAM GRUNDY, RICHARD HAACK, DONALD HALAWITH, ERNEST HUSTEDT, HARVEY JOHNSON, STEVEN KALBACH, FRANCIS H. KELLY, JAMES LARRIVEE, EDWARD MANKE, DONALD MICHALSKI, BERNARD NESSEL, NORMAN NISSEN, THOMAS O'CULL, SIGMUND TRYKOSKI, WALTER WAGEMANN, and JOSEPH WILLIAMS,

Plaintiffs,

No. 78 C 1755 v.

CITY OF NORTHLAKE,

Defendant.

AFFIDAVIT

I, DOMENIC DIIULIO being first duly sworn upon oath, depose and state that I have knowledge of the contents of this affidavit; that I am authorized to make this affidavit and that, if sworn as a witness, I can testify competently to the facts herein set forth.

1. That I am presently employed as a police officer for the City of Northlake.

2. That prior to January 10, 1978, I was paid overtime pay for working in excess of 40 hours pursuant to a written directive to this effect signed by then and current Chief Lee R. Gehrke.

3. That prior to February 28, 1978, I received longevity pay pursuant to City of Northlake Ordinance #0-1-66.

4. That, since my employment with the City of Northlake, I have been a member of the Northlake Police Pension Fund.

5. That, as a member of the Northlake Police Pension Fund, longevity pay is included in my salary upon which 8½% is deducted from my salary and deposited in the pension fund.

6. That, as consideration for my employment as a police officer for the City of Northlake, overtime and longevity pay were included in my contractual relationship with the City of Northlake.

IN WITNESS WHEREOF, I have set my hand and seal this 8 day of August, 1980.

/s/ Domenic DiIulio

Subscribed and sworn to before me this 8 day of August, 1098.

/s/ STANLEY H. JAKALA
Notary Public

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Id. #1550